

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 541  
**SPONSOR(S):** Thurston  
**TIED BILLS:**

Expunging Criminal History Records

**IDEN./SIM. BILLS:** SB 1214

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	<b>REFERENCE</b>	<b>ACTION</b>	<b>ANALYST</b>	<b>STAFF DIRECTOR</b>
1)	<u>Public Safety &amp; Domestic Security Policy Committee</u>	<u></u>	<u>Krol</u>	<u>Cunningham</u>
2)	<u>Governmental Affairs Policy Committee</u>	<u></u>	<u></u>	<u></u>
3)	<u>Criminal &amp; Civil Justice Appropriations Committee</u>	<u></u>	<u></u>	<u></u>
4)	<u>Criminal &amp; Civil Justice Policy Council</u>	<u></u>	<u></u>	<u></u>
5)	<u></u>	<u></u>	<u></u>	<u></u>

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**SUMMARY ANALYSIS**

When a criminal history record is expunged, criminal justice agencies other than the Florida Department of Law Enforcement (FDLE) must physically destroy the record. Records that have been expunged are confidential and exempt from the public records law. Persons who have had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their record, except in specific instances.

Contrary to current law, HB 541 will allow multiple, automatic expunctions of criminal history records that will not require a certificate of eligibility from FDLE or a \$75 processing fee.

A person is eligible for this type of expunction if they were found not guilty or acquitted by a judge or jury; or the indictment, information, or other charging document was:

- Not filed or issued in the case; or
- Filed and was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction.

If a person was adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity or delinquent act, the record does not qualify for the automatic expunction.

The bill creates cross-references in various statutes related to eligibility for expunction.

The bill has a significant negative fiscal impact on FDLE.

The bill provides an effective date of July 1, 2010.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

##### **Sealing and Expunction of Criminal History Records**

Sections 943.0585 and 943.059, F.S., set forth procedures for sealing and expunging criminal history records. The courts have jurisdiction over their own judicial records containing criminal history information and over their procedures for maintaining and destroying those records. The Florida Department of Law Enforcement (FDLE) can administratively expunge non-judicial records of arrest that are made contrary to law or by mistake.<sup>1</sup>

When a criminal history record is expunged, criminal justice agencies other than FDLE must physically destroy the record. Criminal justice agencies are allowed to make a notation indicating compliance with an expunction order. The FDLE, on the other hand, is required to retain expunged records. When a record is sealed, it is not destroyed, but access is limited to the subject of the record, his or her attorney, law enforcement agencies for their respective criminal justice purposes, and certain other specified agencies for their respective licensing and employment purposes.<sup>2</sup>

Records that have been sealed or expunged are confidential and exempt from the public records law. It is a first-degree misdemeanor to divulge their existence, except to specified entities for licensing or employment purposes.<sup>3</sup>

A person who has had their criminal history records sealed or expunged may lawfully deny or fail to acknowledge the arrests covered by their sealed or expunged record, except when they are applying for certain types of employment,<sup>4</sup> petitioning the court for a record sealing or expunction, or are a defendant in a criminal prosecution.<sup>5</sup>

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<sup>1</sup> Section 943.0581, F.S.

<sup>2</sup> Section 943.0585(4), F.S.

<sup>3</sup> Section 943.0585(4)(c), F.S.

<sup>4</sup> These types of employment include: law enforcement, the Florida Bar, working with children, the developmentally disabled, or the elderly through the Department of Children and Families, the Department of Juvenile Justice, the Department of Education, any district school board, or local governmental entity licensing child care facilities, or a Florida seaport.

<sup>5</sup> Section 943.0585(4)(a), F.S.

In 1992, the Legislature amended the sealing and expunction statutes to require a person seeking a sealing or expunction to first obtain a certificate of eligibility (certificate) from FDLE. Before a person can petition the court to seal or expunge a criminal history record, they must receive a certificate of eligibility from FDLE. In order to receive a certificate, a person must:

(1) Submit to FDLE a written, certified statement from the appropriate state attorney or statewide prosecutor that indicates an indictment, information, or other charging document was not filed or issued in the case or if filed and was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction. Charges related to the record the person wishes to expunge cannot have resulted in a trial, without regard to whether the outcome of the trial was other than an adjudication of guilt.

Criminal history records relating to certain offenses<sup>6</sup> in which a defendant (adult or juvenile) has been found guilty or has pled guilty or nolo contendere, *regardless of whether adjudication is withheld*,<sup>7</sup> may not be sealed or expunged.<sup>8</sup>

(2) Pay a \$75 processing fee.

(3) Submit a certified copy of the disposition of the record they wish to have expunged.

(4) Have never been adjudicated guilty or delinquent for committing a felony or misdemeanor specified in 943.051(3)(b), F.S.,<sup>9</sup> prior to the date of their application for the certificate.<sup>10</sup>

(5) Have never been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity of the record they wish to have expunged.

(6) Have never had a prior sealing or expunction of criminal history record unless an expunction is sought for a record previously sealed for 10 years and the record is otherwise eligible for expunction. A record must have been sealed for 10 years before it can be expunged, unless charges were not filed or were dismissed by the prosecutor or court.<sup>11</sup>

This requirement does not apply when a plea was not entered or all charges relating to the arrest or alleged criminal activity to which the petition to expunge pertains were dismissed prior to trial.<sup>12</sup>

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<sup>6</sup> These offenses include: sexual misconduct with developmentally disabled clients, mental health patients, or forensic clients, or the reporting of such sexual misconduct; luring or enticing a child; sexual battery; procuring a person under 18 years for prostitution; lewd, lascivious, or indecent assault upon a child, lewd or lascivious offenses committed on an elderly or disabled person; communications fraud; sexual performance by a child; unlawful distribution of obscene materials to a minor; unlawful activities involving computer pornography; selling or buying minors for the purpose of engaging in sexually explicit conduct; offenses by public officers and employees; drug trafficking; and other dangerous crimes such as arson, aggravated assault or battery, kidnapping, murder, robbery, home invasion robbery, carjacking, stalking, domestic violence, and burglary.

<sup>7</sup> A withhold of adjudication is a manner of disposition in which the court does not pronounce a formal judgment of conviction. [http://www.flcourts.org/gen\\_public/pubs/bin/srsmanual/Glossary\\_2002.pdf](http://www.flcourts.org/gen_public/pubs/bin/srsmanual/Glossary_2002.pdf) (Last visited March 12, 2010).

<sup>8</sup> Sections 943.059 and 943.0585, F.S.

<sup>9</sup> These offenses include: assault, as defined in s. 784.011; battery, as defined in s. 784.03; carrying a concealed weapon, as defined in s. 790.01(1); unlawful use of destructive devices or bombs, as defined in s. 790.1615(1); negligent treatment of children, as defined in s. 827.05; assault or battery on a law enforcement officer, a firefighter, or other specified officers, as defined in s. 784.07(2)(a) and (b); open carrying of a weapon, as defined in s. 790.053; exposure of sexual organs, as defined in s. 800.03; unlawful possession of a firearm, as defined in s. 790.22(5); petit theft, as defined in s. 812.014(3); cruelty to animals, as defined in s. 828.12(1); arson, as defined in s. 806.031(1); and unlawful possession or discharge of a weapon or firearm at a school-sponsored event or on school property as defined in s. 790.115.

<sup>10</sup> Section 943.0585(2)(d), F.S.

<sup>11</sup> Section 943.0585(2)(h), F.S.

<sup>12</sup> *Id.*

(7) No longer be under any court supervision related to the disposition of the record they wish to have expunged.

In addition to the certificate, the petitioner must also submit a sworn statement that they:

- have not previously been adjudicated guilty of any offense or adjudicated delinquent for certain offenses;
- have not been adjudicated guilty or delinquent for any of the charges they are currently trying to have sealed or expunged;
- have not obtained a prior sealing or expunction; and
- are eligible to the best of their knowledge and has no other pending expunction or sealing petitions before the court.<sup>13</sup>

Any person knowingly providing false information on the sworn statement commits a felony of the third degree.<sup>14</sup>

If the person meets the statutory criteria based on FDLE's criminal history check and receives a certificate, he or she can petition the court for a record sealing or expunction.<sup>15</sup> It is then up to the court to decide whether the sealing or expunction is appropriate.<sup>16</sup>

FDLE currently processes about 1,000 court orders per month that meet the sealing and expunging criteria.<sup>17</sup>

### **Sealing and Expunging Juvenile Records**

Juveniles have a few more options than adults do when choosing to have a record expunged. If a juvenile successfully completes a prearrest, postarrest, or teen court diversion program after being arrested for a nonviolent misdemeanor, he or she is eligible to have the arrest expunged providing there is no other past criminal history. This expunction does not prohibit the juvenile from requesting a regular sealing or expunction under s. 943.0585 or s. 943.059, F.S., if he or she is otherwise eligible.<sup>18</sup>

Juvenile delinquency criminal history records maintained by the FDLE are also expunged automatically when the juvenile turns 24 years of age (if he or she is not a serious or habitual juvenile offender or committed to a juvenile prison) or 26 years of age (if he or she was a serious or habitual juvenile offender or was in a juvenile prison), as long as the juvenile is not arrested as an adult or adjudicated as an adult for a forcible felony.<sup>19</sup> This automatic expunction does not prohibit the juvenile from requesting a sealing or expunction under s. 943.0585 or s. 943.095, F.S., if he or she is otherwise eligible.

Criminal history records are public records under Florida law and must be disclosed unless they have been sealed or expunged or have otherwise been exempted or made confidential.<sup>20</sup> Fingerprints are exempt and are not disclosed by the FDLE. Juvenile criminal history information that has been compiled and maintained by the FDLE since July 1, 1996, is also considered by the department to be a public record, including felony and misdemeanor criminal history information.<sup>21</sup> However, an ongoing lawsuit was filed by the Public Defender's Office in the Eleventh Judicial Circuit Court in Miami-Dade

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<sup>13</sup> Section 943.0585(1)(b), F.S.

<sup>14</sup> Section 943.0585(1), F.S.

<sup>15</sup> Section 943.0585(2), F.S.

<sup>16</sup> Section 943.0585(3)(b), F.S.

<sup>17</sup> FDLE 2010 Analysis of HB 541.

<sup>18</sup> Section 943.0582, F.S.

<sup>19</sup> Section 943.0515(1) and (2), F.S.

<sup>20</sup> Section 119.07(1), F.S., s. 24(a), Art. I, State Constitution.

<sup>21</sup> Section 943.053(3)(a), F.S., ch. 96-388, L.O.F.

County, which challenges the department's position based upon the general confidentiality provisions for juvenile records in s. 985.04 (1), F.S.<sup>22</sup>

### **Effect of Proposed Changes**

HB 541 allows for an automatic expunction of criminal history records if the person was found not guilty or acquitted by a judge or jury; or the indictment, information, or other charging document was:

- Not filed or issued in the case; or
- Filed and was dismissed or nolle prosequi by the state attorney or statewide prosecutor or was dismissed by a court of competent jurisdiction.

If a person was adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity or delinquent act, the record does not qualify for expunction.

The petition a person would file for the automatic expunction of a criminal record only requires a certified copy of the disposition of the offense sought to be sealed. There is no requirement for a certificate of eligibility through FDLE or a sworn statement by the petitioner.

Any court of competent jurisdiction may order a criminal justice agency to expunge the criminal history record of a minor or adult who qualifies for the automatic expunction.

The petition will be served upon the appropriate state attorney or the statewide prosecutor and upon the arresting agency. The appropriate statewide prosecutor or arresting agency may respond to the court regarding the completed petition.

The court may order the expunction of a criminal history that pertains to more than one arrest or one incident of alleged criminal activity if a person has not been adjudicated guilty or delinquent for committing any of the acts stemming from the arrest or alleged criminal activity or delinquent act they are seeking to have expunged.

If the petitioner is granted relief, the clerk of the court will certify copies of the order to the appropriate state attorney or statewide prosecutor, to the county, and to the arresting agency. Each of these entities must forward the order to other entities to which they have disseminated the now expunged criminal history record.

FDLE or other criminal justice agencies are not required to act on orders to expunge entered by the court when the order does not comply with the requirements of this section. When such an order is received, FDLE must notify the issuing court, the prosecutor or statewide prosecutor, the petitioner or the petitioner's attorney and the arresting agency within 5 business days. The state attorney or statewide prosecutor will take action within 60 days to correct the record and petition the court to void the order. No cause of action, including contempt of court, will be filed against any criminal justice agency for failure to comply with an order when such an order to expunge does not comply with the requirements of this section.

Any expunctions granted under this section will not prevent a person from petitioning for a sealing or expunction provided in ss. 943.0585 or 943.059, F.S., if they are otherwise eligible.

The bill provides that a minor who participates in a prearrest, postarrest, or teen court diversion is eligible to have the related record expunged by the automatic expunction process created by this bill. In addition, a person who has their charges dismissed after participation in a treatment-based drug court program is also eligible to have the record expunged through automatic expunction.

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<sup>22</sup> *G.G. v. FDLE*, Case No.: 07-00599 CA 21 (Miami-Dade Circuit Court); Section 985.04(1), F.S., provides that juvenile records are confidential, subject to specified exceptions, and limited disclosure to certain enumerated entities or upon court order. Subsection (2) generally allows for the disclosure of an arrest report for a juvenile arrested for a felony or an arrest report for a juvenile found by a court to have committed three or more misdemeanor offenses.

The bill also provides that if a person is petitioning to have a record sealed or expunged under ss. 943.0585 or 943.059, F.S., it is unlawful to deny or fail to acknowledge arrests covered by the record sought to have sealed or expunged if the subject of the record concurrently or subsequently petitions for the automatic expunction of a criminal history record.

Finally, the bill states that the automatic expunction statute it creates will not affect any administrative expunction of a person's criminal record resulting from a wrongful arrest, conviction, and incarceration.

**B. SECTION DIRECTORY:**

Section 1. Creates s. 943.095, F.S., relating to automatic qualification for expunction of criminal history record if no finding of guilt.

Section 2. Amends s. 943.0582, F.S., relating to prearrest, postarrest, or teen court diversion program expunction.

Section 3. Amends s. 943.0585, F.S., relating to court-ordered expunction of criminal history records.

Section 4. Amends s. 943.059, F.S., relating to court-ordered sealing of criminal history records.

Section 5. Amends s. 948.08, F.S., relating to pretrial intervention program.

Section 6. Amends s. 948.16, F.S., relating to misdemeanor pretrial substance abuse education and treatment intervention program.

Section 7. Amends s. 961.06, F.S., relating to compensation for wrongful incarceration.

Section 8. Amends s. 985.345, F.S., relating to delinquency pretrial intervention program.

Section 9. Provides an effective date of July 1, 2010.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

This bill may require local and county criminal justice agencies to process additional court orders generated by the automatic expunction of criminal history records. State attorneys may have extensive

new workloads in determining eligibility prior to court actions. Legal staff will have to address cases where FDLE notifies them that an order was issued in error.

D. FISCAL COMMENTS:

FDLE reports that based on an analysis of subjects in the Computerized Criminal History (CCH) file with one or more arrest records which would qualify for automatic expunction, approximately 1,893,440 individuals could potentially petition for an “automatic” expunction under this bill. Of these, about 6% (106,570) subjects have applied for a Certificate of Eligibility under the current law. This leaves 1,787,407 additional subjects that could be eligible to request an expunction without receiving a prior Certificate of Eligibility from FDLE.

FDLE further analyzes that while it is not likely that all 1,787,407 of the subjects would apply to a court for an expunction, a significant number can be expected to. If only 5% of the potential is realized over a year, the total estimated workload would increase by 89,370.

Based on the 5% potential increase:

- 17 additional Criminal Justice Customer Service Specialist (CJCSS) positions would be required to complete the evaluation and affect the expunctions in the state criminal history file, and
- 2 additional Government Analysts would be required to contact the courts and the state attorney in regards to court orders issued in error and other issues and questions.

Because there is no certificate of eligibility, there is no revenue to cover this new workload.

FDLE estimates that revenues can be expected to decrease, an estimated 6% the first year, and decreasing additionally by about 8% each subsequent year as the number of subjects who are eligible under this bill will no longer need to pay the fee for the certificate of eligibility.

	(FY 10-11) Amount / FTE	(FY 11-12) Amount / FTE	(FY 12-13) Amount / FTE
A. Revenues			
1. Recurring	-90,000	-97,200	-104,976

(Decrease in revenue for individuals who would apply for a certificate under the current law and would be able to petition the court without a Certificate of Eligibility under this bill.)

2. Non-Recurring

B. Expenditures (see charts below)

<b>Positions 17 Criminal Justice Customer Service Specialists salary &amp; benefits</b>	<b>\$726,999</b>	<b>\$726,999</b>	<b>\$726,999</b>
<b>Standard Expense for 17 Positions</b>	<b>\$176,545</b>	<b>\$110,636</b>	<b>\$110,636</b>
<b>Standard HR Services for 17 Positions</b>	<b>\$6,783</b>	<b>\$6,783</b>	<b>\$6,783</b>

<b>Positions 2 Government Analyst salary &amp; benefits</b>	<b>\$100,652</b>	<b>\$100,652</b>	<b>\$100,652</b>
<b>Standard Expense for 2</b>	<b>\$20,770</b>	<b>\$13,016</b>	<b>\$13,016</b>

<b>Positions</b>			
<b>Standard HR Services for 2 Positions</b>	<b>\$798</b>	<b>\$798</b>	<b>\$798</b>

<b>Total Salary &amp; Benefits for 19 positions</b>	<b>\$827,651</b>	<b>\$827,651</b>	<b>\$827,651</b>
<b>Total Expenses for 19 Positions</b>	<b>\$197,315</b>	<b>\$123,652</b>	<b>\$123,652</b>
<b>Total HR Services for 19 Positions</b>	<b>\$7,581</b>	<b>\$7,581</b>	<b>\$7,581</b>
<b>TOTAL 19 Positions</b>	<b>\$1,032,547</b>	<b>\$958,884</b>	<b>\$958,884</b>

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take any action requiring the expenditure of funds; reduce the authority that municipalities or counties have to raise revenue in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

##### 2. Other:

#### B. RULE-MAKING AUTHORITY:

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill requires "the county" to forward the court's order to expunge a criminal history record to any agency, organization, or company to which the county has disseminated said record. It is unclear which agency "the county" may refer to. In addition, it is unclear if the intent of the court's order is to bind private companies or parties, which may include LexisNexis or Google.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES